IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1876

DEL RIO DISTRIBUTORS, INC.,
Petitioner,

v.

ADOLPH COORS COMPANY,
Respondent.

BRIEF OF THE ADOLPH COORS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Expressed in the circumstances of this case, the question presented should be whether in a federal question lawsuit, arising under the Sherman Act, a state statute or constitution should be applied as the rule of decision to determine whether the federal statute was violated.

STATEMENT OF THE CASE

The Respondent, Adolph Coors Company (Coors), deems the following additions to the statement of the

case necessary to correct inaccuracies in Del Rio's statement:

1. Del Rio erroneously characterizes the relationship between itself and Coors as an exclusive distributor arrangement. The contract between Coors and Del Rio stated on its face that the distributor relationship was a non-exclusive, personal right to wholesale Coors beer in Del Rio and surrounding counties. The agreement also provided that Coors, in its sole discretion, could appoint additional distributors to service particular accounts within the territory designated for Del Rio without consulting Del Rio.

2. Del Rio next asserts that it was restricted to wholesaling Coors beer within a designated territory and that when the territory finally became profitable Del Rio was terminated. The record is replete with uncontradicted evidence that Del Rio was plagued with managerial, organizational, and operational problems almost from the outset of its distributor relationship with Coors. The principals in the Del Rio distributorship were repeatedly advised, orally and in writing, of deficiencies in their operation. Problems cited, among others, were that the distributorship was overstaffed, inventory was not properly refrigerated or rotated, personnel were poorly trained and ineffective, and that the distributorship failed to control capital and overhead costs. In May, 1971, Del Rio was placed on probation and allowed 90 days in which to bring its operation up to standards satisfactory to Coors. When the deficiencies in operation were not corrected to Coors' satisfaction, Del Rio was terminated and given a reasonable period of time in which to sell the distributorship. The termination reflected nothing more than a business decision on the part of Coors to replace an unsatisfactory distributor.

3. Del Rio admits that its antitrust claim arising under the laws of the State of Texas was abandoned prior to trial but asserts that the claim was abandoned in order to "induce" Coors to enter into the pre-trial order dated February 25, 1977. This characterization is objectionable in view of the pre-trial order, which clearly reflects that Del Rio abandoned its state antitrust claim so that no "jurisdictional questions" would exist. Since the only jurisdictional question in Del Rio's Second Amended Complaint was whether the District Court had pendent jurisdiction over the state law claim, it is clear this was the jurisdictional question Del Rio intended to eliminate. That Del Rio intended to pursue only its federal claim is further indicated in the pre-trial order in the statement of contested issues which challenged the alleged trade restraints only on the ground that they violated the "antitrust laws of the United States."

ARGUMENT

This suit was brought under Section 1 of the Sherman Act, 15 U.S.C. § 1, and the Texas antitrust laws, alleging that Coors engaged in price fixing, imposed territorial restraints on distributors which were illegal per se, and wrongfully terminated Del Rio as its distributor. In the pre-trial order, Del Rio abandoned its state law claim and proceeded solely on its federal antitrust claims. Accordingly, no evidence was introduced relative to the state claims, and, in fact, the relevant state statutes and constitution were not included in the trial court record. During trial the decision in *Continental T.V., Inc. v. G.T.E. Sylvania,* 433 U.S. 36, 53 L.Ed.2d 568, 97 S.Ct. 2549 (1977), overruling *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 18 L.Ed.2d 1349, 87 S.Ct. 1856 (1967), was issued by this Court. In view of

Continental T.V., Del Rio moved at the close of all the evidence to enlarge the pre-trial order asking the District Court to reinstate Del Rio's previously abandoned claim under the Texas antitrust law. Del Rio's motion and requested instructions, based on state law, were denied. The Court of Appeals upheld the trial judge's refusal to enlarge the pre-trial order noting that Del Rio did not request a continuance or additional time in which to present evidence under a rule of reason analysis as dictated by *Continental T.V.*, and that Del Rio failed to establish that the trial judge abused his discretion. Instead, Del Rio, relying on the doctrine of collateral estoppel, requested the District Court to enter judgment against Coors, as a matter of law, asserting that the issues litigated in this suit had been previously decided adversely to Coors in *Copper Liquor, Inc. v. Adolph Coors Company*, 506 F.2d 934 (5th Cir. 1975), and *Adolph Coors Company v. Federal Trade Commission*, 497 F.2d 1178 (10th Cir. 1974). However, the trial judge, who also presided in the *Copper Liquor* case, refused to apply collateral estoppel offensively on the issue of liability, and the Court of Appeals also held that collateral estoppel had no application in this case.

Del Rio contends in this Petition that the Court of Appeals should have directly addressed the question of whether state antitrust law determines the legality of a vertically imposed territorial limitation in a Sherman Act case and by failing to do so, ignored an important question of law. The Court of Appeals, in fact, answered the question in its holdings that Del Rio "clearly waived any claim it might have had under Texas antitrust law" and that the District Court did not abuse its discretion in refusing to modify the pre-trial order (after trial) to

reinstate Del Rio's previously abandoned state claim based on Texas antitrust law.

As the plaintiff in this suit, Del Rio weighed its causes of action, whether they arose under federal or state statute, or both, selected its forum, and finally tried the suit as one arising under the Sherman Act. Del Rio cannot now complain because, in retrospect, the state law claim might have been successful. The District Court properly exercised its discretion in refusing to modify the pre-trial order, and the Court of Appeals properly affirmed that exercise of judicial discretion. Coors submits there is no important question of law to be considered, and there is no other basis for invoking this Court's jurisdiction to review the Court of Appeal's judgment on writ of certiorari. Therefore, Del Rio's petition should be denied.

The questions presented by Del Rio in this Petition for Certiorari are whether a trade restraint which allegedly constitutes a felony violation of state law is also unlawful as a matter of law under the Sherman Act; and whether federal antitrust law preempts state antitrust law. (Del Rio's Petition, p. 2, fn. 1). These are the only questions for consideration. *Alice State Bank v. Houston Pasture Co.*, 247 U.S. 240, 62 L.Ed. 1096, 38 S.Ct. 496 (1918); *Mayor v. Educational Equality League*, 415 U.S. 605, 623, 39 L.Ed.2d 630, 94 S.Ct. 1323 (1974).

I. TEXAS STATUTES AND CONSTITUTION AS RULES OF DECISION

Even though the jurisdiction of the District Court was invoked based on the existence of a federal question, and the case was tried under the federal antitrust laws, alleging claims arising out of violations of federal statutes,

Del Rio contends that the Texas antitrust law and constitution "must predominate" over federal law and antitrust policy on the issue of liability. Del Rio contends that the Court of Appeals failed to address an important question of law and ignored Del Rio's primary argument on appeal. Specifically, Del Rio contends that the imposition of exclusive vertical territorial restraints constitutes a felony in Texas; therefore, "Texas antitrust laws must predominate so as to render these [vertical territorial] restrictions unreasonable and illegal per se under the Sherman Act." (Del Rio's Petition, p. 10).

It is clear, however, that where an act of Congress provides the rule of decision it must be applied regardless of state law. *See, Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 82 L.Ed. 1188, 58 S.Ct. 817 (1938); *D'Oench Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447, 471-472, 86 L.Ed. 956, 62 S.Ct. 676 (1942) (Jackson, J., concurring opinion); *United States v. Standard Oil Co.*, 332 U.S. 301, 307, 91 L.Ed. 2067, 67 S.Ct. 1604 (1947); Rules of Decision Act, 28 U.S.C. § 1652 (1948). Similarly, where a substantive federal policy has developed, or where decisional law suggests uniformity of enforcement, overriding federal interests dictate that federal rather than state law controls. *See, Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176-177, 87 L.Ed. 165, 63 S.Ct. 172 (1942); *Burks v. Lasker*, ___ U.S. ___, 60 L.Ed.2d 404, 411-412, ___ S.Ct. ___ (1979). Notwithstanding Del Rio's assertion that the challenged vertical restraints were wholly intrastate—which was not raised below—the record in this suit is almost exclusively federal. Del Rio's abandonment of its claim arising under state law and its statement of the contested issues in the pre-trial order clearly demonstrate that the case turned on federal rather

than state law. Essentially, Del Rio asks that years of litigation, in which the parties proceeded assuming a federal law issue, be ignored and this case relitigated on a state law claim. Clearly, relitigation should not be commenced in this or any case merely on the chance that a pendent state claim might have merit. *See, Mayor v. Educational Equality League, supra,* at 624-629.

Del Rio raised both federal and state private causes of action in its amended complaint but subsequently abandoned the state cause of action during the pre-trial conference held after the completion of all discovery. According to statements in its Petition, Del Rio voluntarily elected to pursue only its federal cause of action in part because of the lure of treble damages and in part because it believed nothing could be gained pursuing the state claim. (Del Rio's Petition, p. 4, fn. 2). Del Rio's abandonment of its state claim was a voluntary waiver of a known right with full knowledge of the relative merits of the two claims. Del Rio was fully aware of the consequences of its waiver, or should have been aware of the consequences, thus the trial judge properly refused to enlarge the pre-trial order and reinstate the state claim after the close of all the evidence.

Moreover, state law as an alternative rule of decision, may not be dispositive of Del Rio's claim that vertical territorial restraints are illegal as a matter of law. The Texas cases cited by Del Rio may be characterized as supporting the general rule that contracts imposing exclusive territorial restrictions on distributors violate Texas antitrust law and are, therefore, unenforceable. State decisional law recognizes, however, a manufacturer's right to sell to whomever he pleases and his right to choose the number of distributors—one, two, or more—he will place in a particular area. *Sherrard v. After*

Hours, Inc., 464 S.W.2d 87 (Texas, 1971). With regard to exclusive territories, the Texas Supreme Court, in *Sherrard*, held that a contract by which a supplier binds himself to sell to only one distributor for an exclusive territory violates the antitrust laws of Texas and is unenforceable. In this suit, however, the contract between Coors and Del Rio states, on its face, that the distributor relationship is non-exclusive and that Coors may appoint other distributors to sell in Del Rio's territory. Thus, the vertical trade restraints alleged by Del Rio may not fall within the prohibition of Texas antitrust law as Del Rio has asserted.

Finally, Del Rio's contention that state law determines whether vertically imposed trade restraints violate the Sherman Act contravenes this Court's holding in *Continental T.V.* that any departure from the rule of reason standard in analyzing vertical restrictions must be based upon demonstrable economic effects. Clearly a state rule of decision, which is inconsistent with the rule of *Continental T.V.*, should not be applied to determine liability in a federal question case involving vertical trade restrictions.

Regardless of whether state law is dispositive of any issues in this case, which Coors does not admit, Del Rio's state law claim was clearly abandoned by counsel prior to trial. The claim was abandoned at a time when Del Rio could weigh the relative merits of the claims and their respective proofs. Essentially, Del Rio asks to be relieved of its decision abandoning the state claim, because, in retrospect, Del Rio now believes that claim has merit. Clearly this is not a proper ground for requesting certiorari.

II. PREEMPTION OF STATE LAW

Del Rio misrepresents an argument presented by Coors in the Court of Appeals. Del Rio asserts that its state antitrust claim is not preempted by federal antitrust law but that Coors argued otherwise in the Court of Appeals. In fact, Coors argued that the questions of federal preemption and whether state antitrust law should be applied in a Sherman Act suit were not properly before the Court of Appeals, because Del Rio had abandoned its state law claims prior to trial.

As in the Court of Appeals, the question of whether Texas antitrust law is preempted by federal antitrust law is again presented by Del Rio. Whether or not the doctrine of federal preemption applies is not dispositive of this suit. Had Del Rio not abandoned its state claim, the District Court would have determined whether it was proper to decide the pendent state claim, but the necessity of making that determination was eliminated by Del Rio's election not to proceed on the state claim. Significantly, Del Rio did not have an absolute right to have its pendent state claim resolved by the District Court. Pendent jurisdiction is a doctrine of discretion not of plaintiff's right and involves considerations of judicial economy, convenience, and fairness. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 16 L.Ed.2d 218, 86 S.Ct. 1130 (1966). Absent a showing by Del Rio of an abuse of judicial discretion by the trial judge or manifest injustice, the Petition for Writ of Certiorari should be denied.

This is a case where the plaintiff was well aware of the nature of his federal and state claims, the relative importance of each, and the proofs necessary to establish each claim. With full knowledge of the importance of each of these claims, Del Rio abandoned its pendent

state claim and proceeded to trial solely on the federal claim. Even though Del Rio now senses there might be something to be gained by pursuing the state claim, it should not be relieved of the consequences inherent in its pre-trial election absent a showing of manifest injustice or an abuse of judicial discretion.

CONCLUSION

The Petitioner has failed to demonstrate any basis in fact or in law to invoke this Court's jurisdiction to review the judgments below on writ of certiorari. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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